In the Supreme Court of the United States.

OCTOBER TERM, 1923.

ZIANG SUNG WAN, PETITIONER,
v.
UNITED STATES OF AMERICA, RESPONDENT. | No. 451.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION BY THE UNITED STATES TO ADVANCE.

The Solictor General moves to advance the above-entitled cause for hearing at the earliest practicable date convenient to the court.

Wan, petitioner, was, in the Supreme Court of the District of Columbia, indicted, tried, and convicted of murder in the first degree, and sentenced to death by hanging. The judgment was, on May 7, 1923, affirmed by the Court of Appeals of the District of Columbia and the case is in this court on a writ of certiorari, issued by this court on October 15, 1923.

The precise question presented is whether reversible error was committed by the trial court in admitting in evidence certain confessions made

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by petitioner over petitioner's objection that, under the doctrine laid down by this court in the case of *Bram* v. *United States*, 168 U. S. 532, such confessions were involuntary under the circumstances appearing in the record in this case.

The same question is now before the Court of Appeals of the District of Columbia in the case of *Edgar Randolph Perrygo, appellant*, v. *United States;* in which case, also, the defendant was sentenced to be hanged for murder in the first degree. And the same question is frequently presented in the trial of criminal cases in the District of Columbia and other Federal courts.

The public interest is involved and an early hearing of the case is desirable in order that the question of the admissibility of confessions under the circumstances appearing in the record in this case, and under similar circumstances in other criminal cases, may be promptly determined.

JAMES M. BECK,
Solicitor General.

NOVEMBER, 1923.

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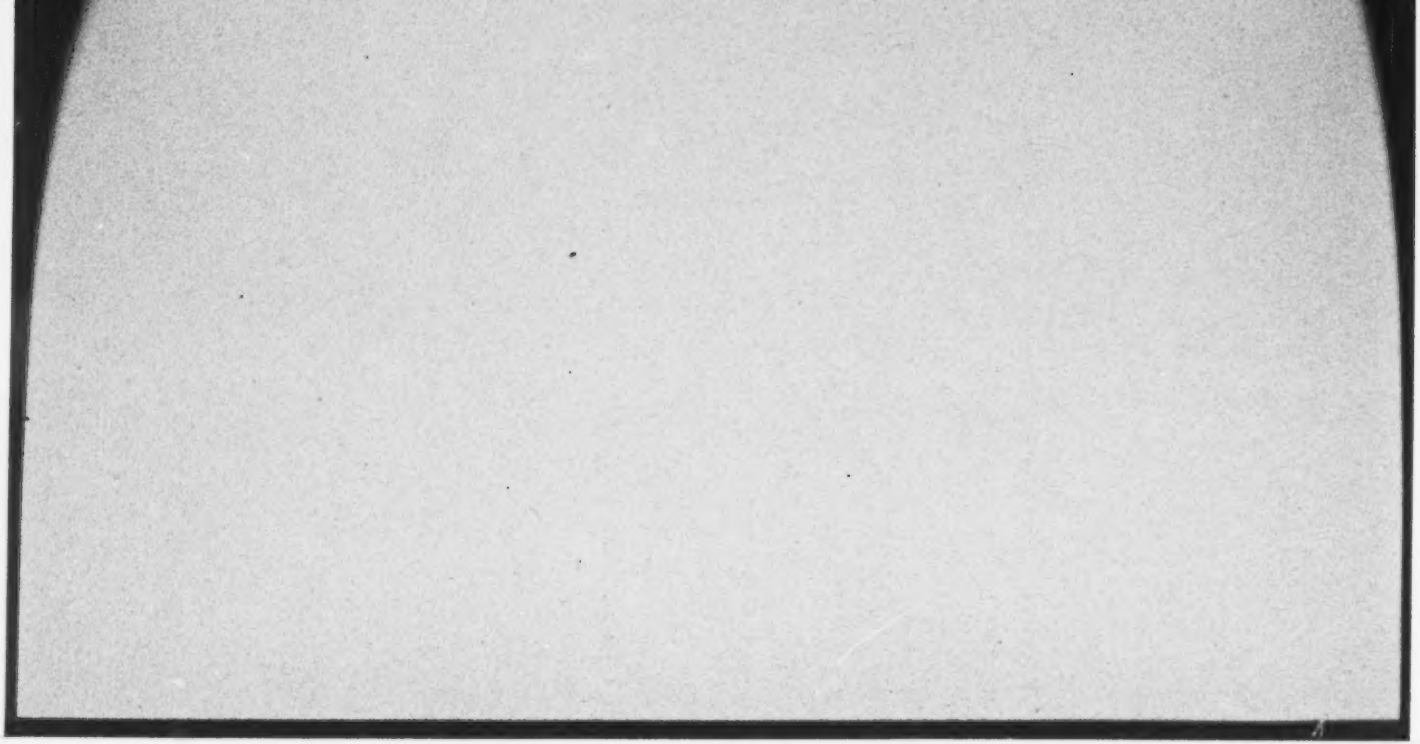

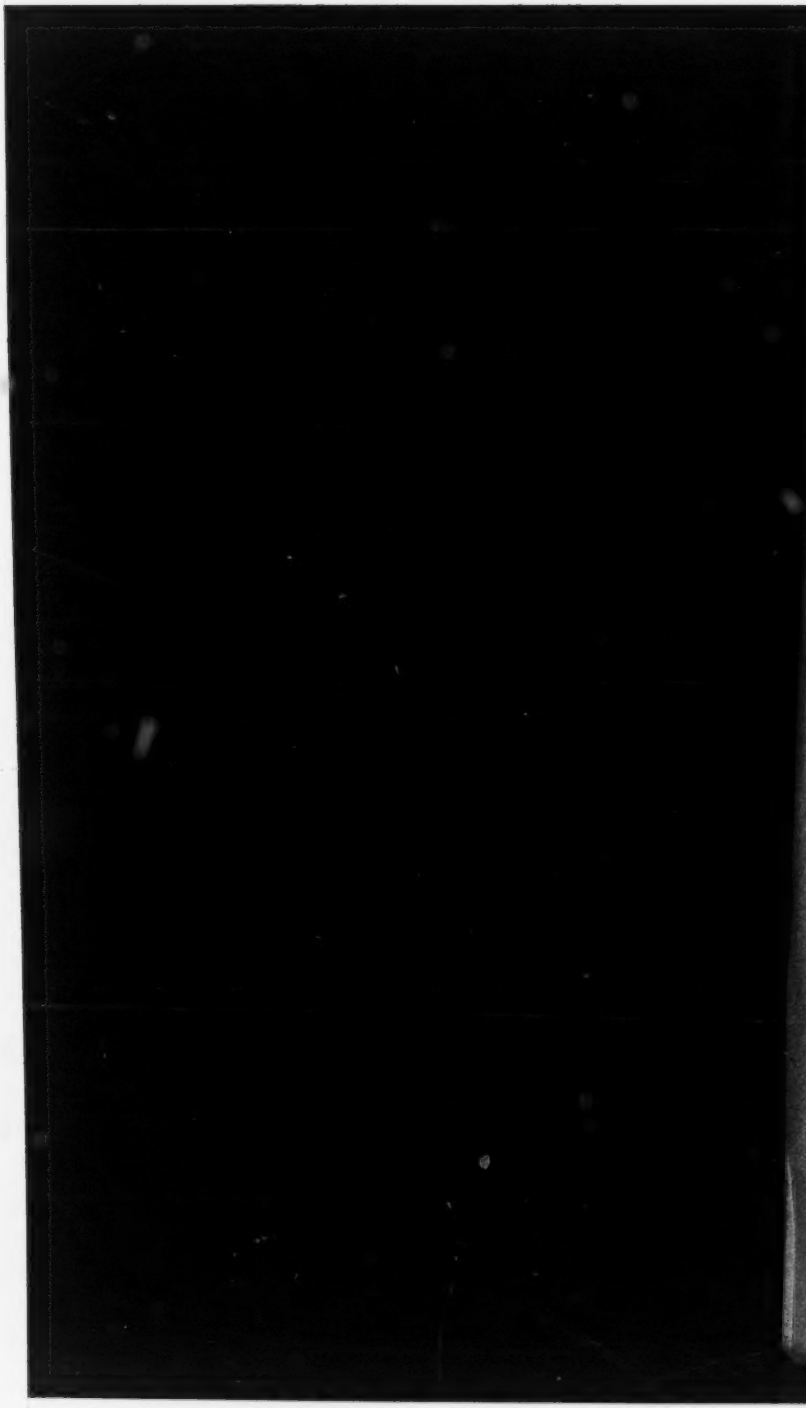

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

ZIANG SUNG WAN, PETITIONER,
v.
THE UNITED STATES OF AMERICA. } No. 451.

ON CERTIORARI FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

On January 31, 1919, more than five years ago, there were discovered at 2023 Kalorama Road NW., Washington, D. C., the lifeless bodies of Dr. Theodore T. Wong, Mr. C. H. Hsie, and Mr. Ben Sen Wu, members of the Chinese Educational Mission. From the gunshot wounds in the bodies, their position in the house, it was evident that they had been murdered.

Ziang Sun Wan, hereinafter referred to as the defendant, after a trial lasting more than a month, was, on January 9, 1920, more than four years ago, found guilty on the fourth count of an indictment charging him with the deliberate and premeditated murder on January 29, 1919, of Ben Sen Wu. (Rec. p. 5, 7, 34.)

At the time of the murder of which he was convicted, Wan had been in the United States for a period of about three years, having come to the United States from Shanghai, China, in 1916. Shortly after his arrival in this country he entered the Wesleyan University at Delaware, Ohio, where his brother Van, who had come to the United States in 1915, was a student. He and his brother Van also attended school in Columbus, Ohio, and in 1918 they attended the summer term of Columbia, University, New York City. (Rec. pp. 122, 135.)

During the summer of 1918 Wan received from Shanghai, for educational purposes, remittances to the amount of $2,000. Shortly before this sum was deposited by Wan in the United States Mortgage and Trust Company, New York City, he stated to an acquaintance, Fohan Chen, that he had received some money from home for educational purposes and enquired of Chen where the latter deposited his funds. At the same time Wan told Chen that he wanted to invest the money in a moving picture business.

In the following September Wan purchased a lease on a moving-picture theater located in Brooklyn. For the lease he paid a thousand dollars down, which amount was drawn on his said account in the United States Mortgage and Trust Company, and agreed to pay an additional amount of $500 later. By November the theater was closed as a failure, with Wan owing $200, and Wan at the time stating that he was

looking for work. (Rec. pp. 30, 31, 32.) Between the time of the closing of the theater and the murder of Ben Sen Wu, a period of about two months, Wan had no employment. On January 13, 1919, Wan received and cashed a check for $50.00 from Ben Sen Wu. (Rec. p. 33.) At this time the balance of Wan's account at the United States Mortgage and Trust Company was $41.07. (Rec. pp. 28, 29.)

On or about January 22, 1919, Wan left the place where he was boarding—313 West 112th Street, New York City—and coming to Washington, became a guest at the home of the Chinese Educational Mission. (Rec. pp. 24, 25, 135.) The members of the Mission at that time consisted of the said Dr. Theodore T. Wong, director; C. H. Hsie, secretary treasurer; and Ben Sen Wu, secretary and clerk. (Rec. p. 34.)

On *Monday, January 27th*, between 10.30 and 11.00 o'clock a. m., Wan registered and procured a room (No. 431) at the Harris Hotel, located near the Union Station. (Rec. p. 35.) At 12.06 p. m. on the same date he sent a telegram to his brother Wan in New York City to come to Washington, and on the next day, *Tuesday, January 28th*, at 12.16 he sent another telegram asking his brother to come to Washington immediately. (Rec. p. 36). *Wednesday, January 29th*, between 9.00 and 10.00 o'clock a. m. his brother Van was seen at the Harris Hotel. (Rec. p. 36.)

On the same day, *January 29th*, at about 7.00 o'clock p. m., one Kang Li, a Chinese student under

the supervision of the Educational Mission, who knew Wan, went to the door, rang the bell of the Mission House. At the same time he noticed a light in the hall near the door and saw Wan's hat and scarf on a rack. The defendant came to the door and was asked by Li whether Mr. Wu or Dr. Wong were at home. Wan stated that they had both gone out and that he, Wan, was going out after awhile. The defendant's demeanor toward Kang Li was cool. (Rec. pp. 34, 35.) *On the same night, Wednesday, January 29-30th, at 12.40 a. m.*, Wan and his brother Van were seen in the Harris Hotel waiting for an elevator to take them upstairs, evidently to room 431, which Wan had engaged there on the 27th. (Rec. pp. 37, 38.)

Ben Sen Wu, earlier in the evening of the same day, Wednesday, *January 29th*, had dinner with some friends at a Chinese café, and was last seen alive about 7.45 p. m. on that date. (Rec. p. 36.) Dr. Theodore T. Wong and C. H. Hsie were last seen alive between *10.00 and 11.00 p. m. of the same day*. (Rec. p. 37.) On *Thursday, January 30th*, a letter carrier went to the Mission House three different times to deliver mail, and rang the bell each time, but no one responded. (Rec. p. 46.)

Thursday, January 30th, a little after 9.00 a. m., Wan and his brother, near the Union Station, engaged a taxicab and drove to the Riggs National Bank. (Rec. p. 39.) Wan remained in the taxicab while Van entered the bank and presented for payment a check, purporting to have been signed by

C. H. Hsie and Dr. T. T. Wong, drawn upon the account of the Educational Mission, in the sum of $5,000, "*payable to bearer.*" At the time Van presented the check for payment he also presented a letter written upon the Mission's stationery, purporting to have been signed by the same persons, requesting the bank to pay the "*check to bearer.*" Van also exhibited to the teller the card of Ben Sen Wu. (Rec. pp. 40, 41, 42, 43.) The check was examined by two or three officials of the bank and payment refused. While the check was being examined, Van asked one of the officials to call the Mission House. This was done, but no response was had. Wan and Van then returned in the same taxicab to the Union Station, *where Van paid the fare.* (Rec. p. 39.)

On the same day, January 30th, between 12.00 and 1.00 p. m., Wan "checked out" at the Harris Hotel (Rec. p. 35) and around 5.00 p. m. of the same evening Van was seen near his lodging place in New York, and Wan was seen in his room in New York the next morning. (Rec. p. 25.)

The following day, Friday, January 31st, at about 6.00 o'clock p. m., at the request of Mr. Sun of the Chinese Legation (Rec. p. 47), the Mission House was entered by Kang Li, who saw there in the reception hall the body of Dr. Wong which had an incised wound about two inches long on the forehead, and abrasion on the top of the head, three or four on the back of the head, and two gunshot wounds in the

chest, one of which entered the heart. The bodies of Ben Sen Wu and C. H. Hsie were found in the basement, one of the bodies having two gunshot wounds in the chest, and the other a gunshot wound in the head and one in the chest. The wounds were caused by 32-caliber bullets. A 32-caliber revolver was found on a chair near the bodies of Wu and Hsie. An autopsy showed that all three had been dead longer than 36 hours. (Rec. pp. 47, 57.)

On Saturday morning, February 1, 1919, at about 8.30 a. m., Detectives Burlingame and Kelly, of the Washington Police force, accompanied by Kang Li, who saw Wan at the Mission House on *January 29th*, and who later discovered the bodies at the Mission House, went to the boarding house of Wan and his brother Van in New York City. When the officers entered the room, leaving Kang Li in the hall, they found Wan in bed, with a tablet and some paper in his hands. They told him they were officers from Washington investigating the death of Dr. Wong. Wan then said that he had just learned from the papers about the death of his good friends and was about to draft a telegram of condolence to his friend Kang Li. He then asked the officers a number of questions concerning the death of his friends, when they were killed, when the bodies were discovered, where they were found, and whether the officers had found the murderers. Burlingame then asked Wan how long he had been in Washington and when he left. To these questions Wan replied that he had been in Washington about a week and had left there

on *January 27th.* (This is the day he registered at the Harris Hotel.) At this point Kang Li was called into the room, and, after he had spoken to Wan and Van, Wan was again asked when he left Washington, and he said on *January 29th.* (This was the day he was seen by Kang Li at the Mission House.) (Rec. pp. 59, 60.)

During the conversation among the officers, Kang Li, and Wan, the *latter expressed a desire to go to Washington, stating that there might be something he could do to assist the officers in locating the murderers of his friends.* Burlingame then informed him that he would be glad to have Wan go, as from the information they had received he, Wan, was the last person to see these men alive. Wan then stated that he would like to go but that he did not have any money (the testimony showed that he had on his person only a few dollars and an uncashed check from Ben Sen Wu in the sum of $30.00); that he did not think his physical condition would permit it; that his stomach was bad and he might need medical attention. Burlingame promised to pay Wan's expenses, and Kang Li told Wan that he ought to come to Washington, stating that either he or Wan might be suspected of doing the killing. (Rec. p. 59.) *Wan then consented and came with the officers to Washington.* To avoid press reporters on arrival at the Union Station, he was taken to No. 409 15th Street NW., instead of to the Police Headquarters. Here he was engaged in conversation by Major Pullman, then Superintendent of Police. Wan told the latter that on

January 29th he had had dinner with Ben Sen Wu; that he and Wu went to the Union Station together, and that he, Wan, took a train leaving for New York at 8.15 p. m., and when closely questioned on this point he said he did not have dinner with Wu but that he was sure that he left on a train leaving Union Station at *8.15 p. m. January 29th.* (Rec. p. 92.)

There were present at the time Inspector Grant, Detective Sergeants Burlingame and Kelly, and witness. We told him we appreciated his coming; he came of his own accord; he was not feeling any too well after his journey, and we questioned him and told him what occurred. The four of us telling him, in order to make it possible for him to help us as far as he could in arriving at who committed this deed; we asked him about his staying as a guest of Mr. Wu at the Mission House; he told us of having been there three or four days, and having left Washington Wednesday evening; had had dinner with Mr. Wu; said he left on the 8.15 train; asked if he was sure Wan first said "of course"; asked if it was not the 6 or 7 o'clock train, Wan said no; said he was sure it was the 8.15 train. Witness said, "Mr. Wan, you have come here, according to your statement, to help us in the investigation, and have started out by telling us two deliberate falsehoods." Wan said "It is true"; witness told him it was absolutely untrue that he left on the 8.15 train, or that he had dinner with Mr. Wu; told him that Mr. Wu had dinner with U. Shang Li, Howard Jeffers, and King Chu on

> Wednesday, and he could not have had dinner with him; defendant said he did not have dinner with him, but Mr. Wu, knowing defendant was not feeling well, got him some fruit and went with him to the station, and ate there just before the train went out; witness had conversation with Wan regarding going to the bank; all this occurred during the hour and a half or two hours following his arrival. Asked him if he had been at the Riggs Bank or knew anything about this $5,000 check, all of which he denied. We had the bank men look at him and they all said he was not the man who appeared at the bank with the check. We asked him about his brother and *he denied that his brother had been in Washington.* [Italics supplied.] (Rec. p. 92.)

After Wan had remained at 409 15th Street long enough for certain officers of the Riggs National Bank to come into the room to see whether he was the person who had presented the $5,000 check purporting to have been signed by Dr. Wong (Rec. p. 61), it was suggested that he be taken to a hospital, but on objection from him he was taken to the Dewey Hotel, and although not placed under arrest was kept under close surveillance.

Wan having *expressed a desire to assist the officers in finding the murderers of his friends*, he was during the week following his coming to Washington from New York, questioned nearly every day, and sometimes several times a day, by Major Pullman, Inspector Grant, and Detectives Burlingame and Kelly.

(Rec. pp. 61, 64.) For several days of that week Wan did not tell them anything different about his movements just prior to and at about the time of the murder from what he had told them on his arrival at Washington. On Friday, February 7th, four days after Wan had come to Washington with the detectives, Inspector Grant stated to him that the check had nothing to do with the murder, and asked him if he knew who went to the bank. Wan replied that "If you get the man who went to the bank you will get the murderer." (Rec. p. 79.) The Inspector then told Wan that his brother Van had told him that he, Van, went to the bank. At this statement Wan became excited and said "It's a lie," and refused to discuss the subject any further. (Rec. pp. 65, 79.)

During this week Wan had repeatedly expressed a desire to go to the Mission House to look it over. (Rec. pp. 65, 66.)

Accordingly, arrangements had been made to take him there on Friday, but owing to the fact that he had broken his glasses he was unable to go until about 8.00 o'clock p. m. Saturday, February 8th. (Rec. pp. 64–65.) Major Pullman, Inspector Grant, and Detectives Burlingame and Kelly on said evening accompanied Wan to the Mission House, and after they had arrived there Wan and his brother Van, who had also been at the Dewey Hotel under surveillance, were shown where the bodies of the three men were found, during which time Wan asked a

number of questions pertaining to the condition of the house and the position of the bodies when found. (Rec. p. 66.)

After the house had been gone over, Major Pullman exhibited to Wan some photostat copies of his own handwriting and also a photostat copy of a check stub from the check book of the Chinese Educational Mission, upon which stub was written "T. T. Wong, $5,000." Certain similarities in the forming of the letters on the several exhibits were pointed out to Wan, and he was asked if he would tell who wrote the check stub. After making an examination, Wan said "I think I wrote that," indicating the check stub. He was told by Major Pullman that they did not want to know what he thought about it, and then he, Wan, said that he wrote the entries on the stub. (Rec. pp. 67–93.) For several hours afterwards he was questioned closely about the check and his connection with it, but he refused to make any further disclosures. He was then taken to No. 10 Police Station and there charged with murder. (Rec. pp. 67–68.)

On Sunday, February 9th, after Wan, at his own request, had talked to one K. S. Wang alone, Grant, Burlingame, and Kelly were called in and Wan told them that he saw Wong and Hsie killed by Wu, and Wu killed by a man named Chen. (Rec. p. 68.) Pressed for details he said he was tired and would tell them more next day. The officers then left him. (Rec. p. 68.) In the morning of the day following on

being asked about the details that he had stated he would give, he asked to be taken to the Mission House. Upon arrival at the Mission House he started to explain how he had seen the three men killed. (Rec. p. 68.) He was interrupted and told that he knew that there was no Chen in it; he admitted that this was so, and stated that he had killed Wu, after the latter had killed Wong, and Hsie. (Rec. pp. 68–81.) On the next day, Tuesday, February 11th, Wan was asked by Burlingame if he would make a statement in writing and he said that he would and proposed that Burlingame asked him questions and said he could answer better. (Rec. p. 70.)

He then in the presence of Detective Kelly and his brother Van answered categorical questions propounded to him by Detective Burlingame, all of which were stenographically reported and when transcribed covered 12 pages of the printed record. (Rec. pp. 70, 107, 108–120.)

The notes after having been transcribed were presented to Wan the next day, February 12th, for his signature. After the same was read to him at his request he subscribed his signature thereto. (Rec. pp. 70, 120.)

Before he made the said statement Burlingame "*advised him it was not necessary; any statement he made would have to be voluntary and would be used against him, and he expressed a willingness to make it.*" (Rec. p. 70.)

In this form he gave a detailed statement to the effect that he and Wu had planned to forge a check

for $5,000; that after he had forged the check and Wu had written the letter to the bank in the kitchen of the Mission House, and Wan had put the letter and check in his pocket, Mr. Hsie came in and was shot by Wu, and later Dr. Wong came and Wu shot him also, and that then he, Wan, shot Wu. (Rec. pp. 70, 108.)

Van testified in defense that on receipt of two telegrams from his brother Wan he came to Washington, arriving here about *1.00 a. m. Wednesday, January 29th.* About noon that day while he was on the street looking for a place to purchase some pineapples for his brother he met two Chinese named T. P. Wong and Moy, who told him that they had seen him when he landed in Vancouver. (Rec. p. 128.) He walked a little distance with them and then left them. At about *six o'clock that night, January 29th,* Wan left the hotel *stating that he was going to visit some friends,* but that he came back to the hotel about eight o'clock. Van then went to a moving picture show returning to the hotel about eleven o'clock and found Wan in bed. Next morning, *January 30th,* Wan and Van went to the Union Station. Wan sat down and Van went to inquire about trains leaving for New York. He then looked into the men's waiting room and there saw the two Chinese that he had met the day before—T. P. Wong and Moy. Wong told Van that he had a check that he wanted cashed; that he did not speak English very well and wanted Van to help him cash

it. *Wong, who looked like Wan*, and Van got in a taxicab and drove to Riggs National Bank. On the way to the bank Wong gave Van a large envelop and told him if the bank people asked him anything to tell them to telephone his home. (Rec. p. 124.) On cross examination he stated that when he was at the bank he told them to telephone to Professor T. P. Wong's house. (Rec. p. 132.) When he was identified by one of the bank officials he denied that he had ever been to the bank. (Rec. p. 163.) The bank having refused to cash the check, the amount of which Van said he did not know (Rec. p. 132), he returned to the Union Station with Wong. (Rec. p. 125.) Moy was waiting for them and he and Wong engaged in an excited conversation, whereupon Van paid the fare. (Rec. p. 132.) Wan was still waiting for him at the station, but he did not tell Wan that he had been to the bank until they had returned to New York, and only after Wan had said to him that Wu was dishonest. (Rec. p. 125.)

Wan testified in his own behalf that at the request of Mr. Wu he stayed at the Mission House from the 22nd to the 27th of January (Rec. p. 135); that on the latter date, because he was sick and did not like to bother Dr. Wong and Mr. Hsie, he left the Mission and went to the Harris Hotel. He telegraphed for his brother so that he could have some one to wait on him. (Rec. p. 136.) When Kang Li saw him at the Mission House on Wednesday evening, January 29th, he had gone for a package that Mr. Wu told him was there. He found no one at home and left a short

time after seeing Kang Li. He returned to the Harris Hotel and because his stomach bothered him—he was suffering from acute constipation (Rec. p. 159)—he went to bed and there remained until his brother Van returned from the picture show. He then felt like taking a walk, and he and his brother walked a short distance past the Union Station. He did not remember what time it was when he returned. Next day, Thursday, January 30th, about nine o'clock he and his brother went to the station to find out about train time; that Van left him and was gone about an hour; that they left for New York about 10 or 11 o'clock. (Rec. pp. 136–137.) When he returned to Washington it was suggested that he be taken to a hospital, but on objection from him he was taken to the Dewey Hotel. (Rec. p. 139.) At the hotel the officers came to see him every day, asked him a great number of questions and accused him of the murder.

On one occasion Inspector Grant said to him: "Wan, never mind about the murder case, we will leave the murder case alone; we are expecting to find out something about the check," and he, Wan, said: "Mr. Grant, after what you have said, who is the man who went to the bank; who is the murderer?" During the whole time he was at the Dewey Hotel the officers gave him lots of suggestions as to how the killing was done, and finally stated that he would take him to the Mission House so that he could see for himself. He objected to going but the officers told him he had to go if he wanted to meet his brother. (Rec. p. 140.) At the Mission House

he was shown where the bodies were found and the blood spots and the bullet holes (Rec. p. 141); and then Major Pullman took him to the third floor, and handing him some photographic copies of his own signature, including that in the hotel register and his name that he had written for Kang Li, asked him to become a handwriting expert; that he told Major Pullman that each one was his handwriting, and then he was handed the check stub and he said "no." The exhibits were again handed to him and certain features of the various writings were called to his attention, particularly a letter "g" on the stub and the same letter in his own writing. He told Major Pullman that the "g" on the stub looked like his own writing, "Just the end of the 'g' not the whole thing." He told Pullman that the writing on the check stub looked like his writing but was not his writing. (Rec. p. 142.) Major Pullman then left and the other officers kept him there a long time, cursed him freely, and often requested him to confess, but he did not make any statement about killing Wu.

On the following Sunday night the officers again questioned him about the killing, and he tried to remember something, "but yet I can not figure out how to tell them something that is not right." Monday morning he was taken by Inspector Grant and Burlingame to the Mission House and asked to tell the whole story. *He told them they had better question him. Then Burlingame questioned him and*

he tried to apply those sayings that were told him by the officers as he wanted to satisfy them. (Rec. p. 144.) When he signed the confession at the jail he knew what he was doing, but he signed it so that the officers would leave him alone. (Rec. pp. 153–154.) No force or compulsion was used to cause him to sign the confession, but it was a suggested confession. (Rec. p. 157.)

POINTS AND AUTHORITIES.

Let us at the outset advert to some general principles the consideration of which we hope will dispel some of the fog created by defendant's brief.

It is claimed by the defendant that the principles of the decision in the Bram case were both pertinent and applicable in the highest degree to the facts in the case at bar. This proposition we admit. But what are the principles of the decision in the Bram case? That involuntary confessions are not admissible in evidence against an accused? That because it was inferred from the facts in that case that the confession admitted in evidence was involuntary, a similar or somewhat similar condition of fact produces the same result? These questions answer themselves. Involuntary confessions are and have always been inadmissible as evidence of the commission of a crime. This is the law of the land as announced in the Bram case and recognized and given full for e and effect by both the trial and Appellate Court i dealing with the case at bar.

On the other hand no court, not even this Honorable Court in the Bram case, has ever attributed to any set of facts or circumstances, short of a clear promise of temporal benefit, or a threat of temporal harm, the infallible effect of producing an involuntary confession from one charged with the commission of crime. The ultimate question of whether a confession is or is not involuntary is not one of law to be decided by judicial precedent, but one of fact to be decided by the intellect and reason operating upon the evidence in a particular case. Therefore it can not in reason be maintained that because the same inference is not deduced from a superficially similar condition of fact, untrammeled, individual view is substituted for controlling judicial precedent, nor conviction of one charged with a capital offense effected otherwise than in accordance with law.

The value of a judicial precedent is derived from its substance rather than its form. The position of the defendant is that the Bram case denounces as inadmissible every confession made in answer to an accusatory question. In substance it denounces only confessions not voluntarily made. But in arriving at the conclusion that the confession in that case was involuntary this court dealt solely with the facts in the case. For in dealing with the question the Court stated:

> In approaching the adjudicated cases for the purpose of endeavoring to deduce from them what quantum of proof, in a case

> presented, is adequate to create, by the operation of hope or fear, an involuntary condition of mind, the difficulty encountered is, that all the decided cases necessarily rest upon the state of facts which existed in the particular case, and, therefore, furnish no certain criterion, since the conclusion that a given state of fact was adequate to have produced an involuntary confession does not establish that the same result has been created by a different although somewhat similar condition of fact.
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> The first of these statements but expresses the thought that whether a confession was voluntary was primarily one of fact, and therefore every case must depend upon its own proof.
>
> *Bram* v. *U. S.*, 168 U. S. 532, 548–549.

The duty in determining from the facts in evidence whether a confession is or is not voluntary devolves in the first instance upon the trial court which must necessarily be vested with a large discretion in the matter. In the case of *Hopt* v. *Utah*, 110 U. S. 574, 583, this court in discussing the admissibility of confessions said:

> The admissibility of such evidence so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed in the first instance to the judge, and since his discretion must be controlled by all the attendant circumstances,

> the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion.

And in a very recent federal case by the Circuit Court of Appeals for the 9th Circuit the rule was announced as follows:

> But where, on the trial of a criminal case a confession of the defendant is offered in evidence it becomes necessary for the trial court to ascertain and determine as a preliminary question of fact whether it was freely and voluntarily made and whether the previous influence, if any, had ceased to operate upon the mind of the defendant. In doing so the court is necessarily vested with a very large discretion which will not be disturbed on appeal unless a clear abuse thereof is shown. *Mangum* v. *U. S.*, 289 Fed. 213, 215.
>
> See also *Brady* v. *U. S.*, 1 App., D. C. 246.
> *Hardy* v. *U. S.* 3 App. D. C. 36, 46.
> *State* v. *Hopkirk*, 84 Mo. 278, 284.
> *State* v. *Rogoway*, 45 Ore. 601.
> *State* v. *Squires*, 48 N. H. 364.

We now propose to deal with the facts in the case at bar with a view of ascertaining whether defendant has maintained his two major propositions, viz:

(A) That the general situation and the remorseless and accusatory questioning of the defendant by the police officers, irrespective of any specific promise or threat held out to the defendant, rendered each and every one of the confessions inadmissible under the doctrine of the Bram case. (Defendant's brief, page 36.)

(B) That specific statements implying threats or promises were made to the defendant by persons in authority. (Defendant's brief, page 71.)

What does the evidence show was defendant's general situation?

He is found by Burlingame and Kelly in his boarding house in New York writing a telegram of condolence to his friend, Kang Li. He was told by those officers that they were investigating the death of Dr. Wong.

> * * * defendant had expressed a wish to go to Washington, might be something he could do to assist in locating the murderers of his friends; * * * said he would like very much to go, would go, but did not have any money; witness said he would be glad to pay his expenses, and defendant said did not think his physical condition would permit it; might need medical attention, his stomach was bad, could only eat certain things at that time, mostly fruit, and might not be able to get proper food; witness assured him would pay his expenses and see that he got proper medical attention if needed (Rec. p. 59); * * * after some conversation defendant consented to be dressed, put a few things in a suit case and then left the house (Rec. p. 60).

After he arrived in Washington he was taken to 409 15th Street Northwest and Major Pullman questioned him.

> * * * said he left Washington on the night of the 29th at 8.15 and there was quite

a little talk; defendant said Mr. Wu had gone to the station with him; Major Pullman told him that could not be possible because he knew where Mr. Wu was; defendant said Mr. Wu got some fruit and defendant ate it at the station, and when pressed he was assured it was impossible that he should have left at 8.15, and defendant refused to talk any more about it at that time. Defendant was asked by Major Pullman if he took a check for $5,000 on the Chinese Educational Mission to the Riggs National Bank and attempted to get it cashed; he denied it and denied knowing anything about the check, and the Major told him "we are going to bring the bank men to see if they could identify you," and defendant said "Bring the bank men, let them see me and they will tell you they never saw me. * * *." Had defendant practically detained at the Dewey Hotel with a man on guard in the room with him; he was taken to the Dewey Hotel because of his physical condition, and the poor arrangements we had around the District Building and the police stations; one reason was, wanted to keep people from seeing him; defendant did not ask for a lawyer at any time; defendant asked on two or three occasions to see his brother * * *. Witness said he understood a doctor had been called in, up to the following Thursday or Friday several times (Rec. p. 61); witness asked that it be done on account of defendant's physical condition, to live up to witness' promise to him; witness had promised Wan

that he should have nothing but proper food and medical attention (Rec. p. 62) * * *.

The triple murder was talked over and discussed in almost every way imaginable; defendant asked the officers a number of times to describe just how the dead bodies were found, where each body was found, during that week at the hotel, and he would ask on two or three occasions to be taken up to the house; he wanted to see the house again to see how everything was around the house, and in reply to one of those requests we told him we would take him to the house and the arrangements were made to take him there on Friday, and then he broke his glasses and did not want to go (Rec. p. 64) * * * unless he could see everything plainly; the glasses had been sent to be repaired, and he got them back, and we took him there at his request on Saturday (Rec. p. 65).

In response to questions of the Court the witness Burlingame stated:

* * * to his knowledge or information, no promise or reward or hope of immunity was offered to defendant to make any statement, and every statement he made was voluntary; there was no threat, no promise, no harsh means to extract any statement from him under any promise or anything; there was nothing beyond his confinement and being rendered immune from other people and the questions; that he had stomach trouble, but he would be up and around; he sat up in bed a great deal; his mind was clear (Rec. p. 65)

* * * you probably might call the defendant's ailment acute constipation (Rec. p. 159).

On cross-examination Major Pullman testified:

First saw Wan at the 15th Street house when they came back from New York, should say about 9 o'clock, may have been 6 or 7; witness thanked Wan very much for coming here, realized we had a very difficult thing to solve, wanted Chinese help, asked him to give all the information he could about the men personally, and about his stay at the mission house, which he did; said Dr. Wong was one of his great friends, practically a guardian, that the last word his mother had said to Dr. Wong when he came over here was to take care of this boy; seemed to have very high regard for Dr. Wong and the other men, but particularly for Dr. Wong, who was very eminent in China. When defendant admitted he was in Washington on Wednesday and left at 8.15, witness told him he had stated he had come here to Washington to help us in this investigation, and had started off by apparently showing bad faith in telling two falsehoods, the time he left and having dinner with Wu. Kang Li was present this time, noticed no coolness between him and defendant; conversation lasted about twenty-five minutes, "because we had to talk to these men in language they could very plainly understand; they knew English quite well, but some expressions we used they did not catch; it was a very much slower task of interviewing than it would have been with you

or any one else speaking perfect English." Defendant was taken to 409 15th Street because it was quite desirable to interview him in privacy, "he was not a prisoner * * *; he was merely a friend of the dead man who had come here to help us * * *; we were bringing him here as our guest; we did not think him guilty of the murder when we (Rec. p. 95) brought him here;" the newspapers had come out that afternoon and published the fact with his picture that we had the man we thought guilty; we did not think so at the time we brought him here * * *.

Had the bankmen come and look at Wan one by one, and go out without saying whether he was or was not the man; it was after they left the room that they said he was not the man; defendant insisted all along that he knew nothing about the check and was entirely innocent. At witness' direction defendant was taken to the Dewey Hotel; Wan was permitted to use the long-distance telephone to New York; asked if it was at witness' direction that a guard was placed at the Dewey Hotel, answers, "it was our directions that a man was to accompany him and be with him at any time, at all times, rather. This guard was changed three times a day; throughout the whole thing he had been in a perfectly good humor with me and most of the others." Witness brought Wan papers—Washington and New York papers. Criticised witness one day for not bringing him the papers, and another time for not dropping in. His brother arrived on Monday. Witness

had numerous conversations with defendant on every subject—international politics, the League of Nations, Chinese customs, literature, and everything else. Witness did not ask him if he believed in God; he volunteered the information that he was a student at St. John's College, Shanghai, which he told us was an Episcopal college; told witness he was a Christian. * * * "We asked him if he wanted to go to a hospital, and he did not; and we wanted to know if he wanted a doctor, and he said no, but wanted to get some medicine he had in New York."

Physicians saw him fully four times. * * * "he had rather a curious desire to see where the men had been killed. One day he broke his glasses; another day he wasn't feeling well. Finally, Saturday came and we decided to take him there"; did not promise him he would see his brother, but "we told him his brother might be there at the same time." His brother was at the Dewey Hotel at the same time; did not permit them to see each other, because neither of us spoke very good Chinese, and we knew if these boys once began talking Chinese to one another our investigation of the case might end right there (Rec. p. 96), although both of them had come here with the statement they came to help us, and we wanted them to help us individually and uncontrolled by any one else; * * * He wanted to see where everything had been done and asked a number of questions; thinks the pictures were shown to him; we told him about the glasses at the bottom of the staircase; that Dr. Wong's body had

been found upstairs on the reception hall floor, indicating that he must have been shot and he had struggled upstairs; that things were in a topsy-turvy condition in the little central room—lamp shade turned over, and so on; is not sure the glasses are Dr. Wong's glasses; the chair on which the pistol had been placed was shown to him; perhaps the pistol was on the chair that Saturday night; he may have handled the pistol; pointed out to him the bullet hole in the wall; does not recall whether his attention was called the glancing bullet blow on the table. * * * defendant is a man who talks now and then; there were no rapid-fire questions, they were slow questions; thinks he was shown the pictures showing the position of the bodies; * * * (Rec. p. 97) moved Wan and Van up to third floor, because some one came in and said there was a crowd of people watching down stairs at the door to see if they could look in and get in, and they could over hear anything being said.

On the third floor, front, we slowly proceeded with the questioning; we asked them about their movements and about the check; they were treated with the utmost consideration; we asked defendant where his brother got the check which he presented to the Riggs Bank; his brother Van had been identified by the bankmen as having presented the check for $5,000, "and we wanted to know where Van got the check"; Wan had told about a mythical fellow by the name of Chin or Chen who had given Van the check down at the

Union Station on Thursday as they were getting into a taxicab; said the man had stopped the taxicab suddenly and spoke first as if he was a stranger and then said he knew them, and defendant said he was an awful fellow who had taken his satchel from him in New York; pretty soon he stopped talking and waited for us to go on (Rec. p. 98); was not satisfied with Wan's statement about the man stopping the taxicab; did not say no such man as Chin existed, for such a man did exist; when defendant was asked about the handwriting, does not recall a complaint about being ill.

Defendant asked to be let alone when he was looking at the handwriting; at no time did he complain about the questioning; * * * witness said to defendant, "Wan, the stub, as you see here, is made out to Dr. Wong; the check your brother Van presented in bank was made out to bearer; that was the information given to us by the Riggs Bank officials; now, we want to know whose handwriting this is * * *; you told Inspector Grant yesterday, Thursday, that the man who wrote—'You find man wrote the check, you find murderer' * * *; you realize that we ought to know who wrote this stub," and he said at first he did not know, then took the other specimen, the check book, turned to stub 24, and witness told him to look at it, look at the "w" on all the specimens, very distinctive "w," just a plain mark up and down; look at the "g" which goes up in the air, and, what is more important, look at the spacing of the letters,

and so on, and he said, "Let me have it and let me alone," and after a few minutes defendant said, "I think that my writing," indicating the stub, which was a very important admission; witness said, "We do not want to know what you think, we want the truth and all the information that you and your brother can give us," and he said, "That is my writing," indicating stub again; * * * (Rec. p. 99). "The stub was plainly his handwriting, * * *."

On cross examination Inspector Grant testified (Rec. p. 83):

Witness did not tell defendant at 15th Street house that he was the one who took the money, killed the men. * * * Witness was not so blunt in the case as to tell defendant at the 15th Street house that whoever cashed the check was the murderer; witness did not say that; did not put anything like that to him the first night; did not come at him and accuse him of the murder like a green policeman on the force two weeks. * * * The first night defendant was asked if he had been to the bank with the check; was told that the members of the mission had been found dead, and on Thursday morning this check was presented to the bank; * * * witness saw defendant Sunday morning at the hotel about 11 o'clock; does not recall who was with witness; remained a half hour or so; defendant was lying in bed; perhaps went again that day with Major Pullman; asked him several ques-

tions about the case; made no suggestions about how it happened at (Rec. p. 84) that time. * * * Told defendant he was the last man in the house; * * * witness talked with defendant's brother and would then go and talk with defendant about the things that asked his brother about, about the case—various conversations about various things; would sit and talk sometimes an hour or more, taken up largely with things defendant wanted to talk about. He was very much concerned about his brother and his brother about him; told him his brother was well; he wanted to see his brother, "but we told him that we would let him see his brother at the right time." * * *

On Friday, February 7th, Van told witness he had been to the bank, and within the next fifteen minutes witness went to see Wan; asked him to tell witness who the man was that went to the bank; that it had very little bearing on the matter; did not have much bearing on the matter of the murder; asked him to tell witness who it was, and he said, "You say that it has not much bearing on the case; if you get (Rec. p. 85) the man that went to the bank, you get the murderer," and then witness said, "know who it was that went to the bank"; then he rolled his eyes around and said, "Who?"; then witness said "Van went to the bank and he told me so." Wan got viciously mad, pounded the bed, and said he would say no more. Witness knew before asking him, from what Van had said, that the latter had been to the bank but

did not tell defendant; the first remark Van made about the bank was, "they fool me," and he told witness this story about going to the bank at the Dewey Hotel; in this conversation had asked Van about the telegram he had received to come here; Van said he thought it was to get a job, and cried and told witness about their fooling him; can not remember the entire conversation.

Van did not say anyone went to the bank with him; * * * defendant "expressed a desire" to go—the mission house; * * * that was on Monday morning, it was earlier than Friday that he expressed the desire; asked if it was not a fact that witness told him he would see his brother at the mission house, says, "Perhaps I did; yes." Asked if it is not a fact that all through that week, from February 1st to the 9th, when a statement about the check was made, witness, Kelly, and Burlingame would question him a half hour at a time, telling him to tell how the thing happened, and shaking their fingers in his face, answers, "Well, we were talking with him sometimes a half or three-quarters of an hour, but at no time were we talking to him that long about the crime. * * *" We would branch off on some other subjects and then would come back to the case; he was in bed most of the time, but lots of times he seemed pretty lively in bed. Was never at the Dewey Hotel after 12 o'clock at night; took defendant to the mission house that particular Saturday night because "we wanted to do everything we possibly could to close

> the case. It had been hanging for a long time, and we just thought the best thing to do would be to take him to the house, as he had expressed a desire to go to the house, and take him there on this particular night and let the two brothers meet and see what they would have to say." * * * On reaching the mission house, took the defendant over the whole scene; showed him some bullet holes in in the kitchen in the wall.

From the foregoing rather full résumé of the testimony touching defendant's general situation it is obvious that he was not, as claimed in his brief, held incomunicado, but was housed in a public hotel, used the long-distance telephone to New York, was visited by a physician, and with the exception of not seeing his brother he had every request gratified. Nor can it be truly said that he was continually questioned. He was questioned about the triple murder. Indeed, he asked many questions about it himself. He came to Washington for the purpose, so he stated, of giving what assistance he could in finding the murderers of his friends.

Since it is earnestly maintained in defendant's brief that his general situation was analogous with the situation presented in the Bram case, let us for a moment examine the facts in that case to see whether defendant's contentions are substantiated.

In the *Bram* case a double murder had been committed on the high seas on a ship of which Bram was an officer. Bram was brought to Halifax in irons and placed in confinement to wait an investigation by

the United States Consul of that port. While awaiting this investigation Bram was caused to be taken from the jail where he was confined to the private office of the police detective. When there alone with the detective he was stripped of his clothing, and, either while he was being stripped or after he was denuded, the detective told him that one Brown had made a statement that he saw Bram commit the murder. In this situation Bram stated, "He could not have seen me. Where was he?" And on being told he was at the wheel, Bram replied, "Well, he could not have seen me from there." *Bram* v. *U. S.*, 168 U. S. 562.

It is respectfully submitted that the situation of Bram was in no wise analogous to the situation of defendant. Bram had been put in fear. As was stated in a recent Federal case by the Circuit Court of Appeals for the 7th Circuit, in *Murphy* v. *U. S.*, 285 Fed. 801, 812:

> What significance must be given to the words "he was stripped of his clothing," which Justice White emphasized by italics? When one accused of murder on the high seas is brought before a police officer in a foreign port, what deductions can be drawn from being stripped of his clothing prior to a demand for a confession? Could he or any other person conclude other than that a flogging would be inflicted if the statement was not satisfactory * * *
>
> Not only did the accused act under conditions which "perturbed the mind," but he

made a denial which contained a negative pregnant, and it was this latter statement that was construed as a confession. There was fully as much justification for rejecting this statement, because of the confusion over its meaning, as there was in rejecting it for the circumstances under which it was given.

Much stress has been placed in defendant's brief upon that part of the opinion in the *Bram* case wherein this Court stated that the statements of Bram were not made by one who in law could be considered a free agent. The term "free agent" has been seized upon in defendant's brief as meaning the opposite of any kind of custody or detention. We submit, however, that no such inference arises from the opinion. We respectfully submit that this honorable Court never intended to go so far as to say that a confession by one in custody of an officer questioned from time to time about a matter of which the circumstance showed that he had some knowledge would render a confession involuntary, and therefore inadmissible.

What defendant's brief attempts to do is to show that he was persistently questioned. To use their expression, "he had to talk." And in that connection many references are made in the brief about a statement by Inspector Grant on cross examination that defendant had to talk. This method of taking out of its general picture some expression and disassociating it from the rest of the testimony will not bring the defendant's situation to the situation presented in the *Bram* case.

It should be noted that when Grant said he had to talk, he merely used the expression as conveying the idea generally that everyone has to talk; that is to say, they can not, as rational beings, forever remain silent. That this is clear is shown from the fact that counsel conducting the cross examination did not ask the witness whether the defendant had to talk about the case. On this point the testimony shows that many times Wan stated to the officers that he did not want to talk any more, and when he did they left him alone. The most striking illustration of this is when he told them on Sunday night that he had seen Wu kill Hsie and Wong, and Chen kill Wu, then announced that he was tired and did not want to tell them anything further that night, the officers let him alone. If they had been pressing him with accusatory questions with the intent to wring from him an unwilling statement about his knowledge and connection with the crime, that is the time when they would have stayed by him and persisted in an effort to make him talk.

An inspection of the record at every point where defendant's brief claims that he was persistently questioned and made to talk will make it clear that whatever might have been their persistence in the particular instance and at that time, he did not talk. All of these circumstances show that defendant talked when he wanted to talk and refused to talk when he did not want to talk, which shows that he was a free agent.

The cases cited and quoted from in defendant's brief plainly show that from the facts and circumstances related in them, that the statements were involuntary and were induced by the hope or fear.

B. Defendant's second major proposition is that the police officers during the course of their investigation made to him specific statements implying threats and promises. Several of these so-called promises and threats have been set forth on pages 71 to 76 of his brief. These will be dealt with in the order raised. The first statement alleged to have held out either a promise or a threat (defendant has not told the court whether it was a threat or a promise) is alleged to be contained in the excerpt from Grant's testimony appearing on page 72 of defendant's brief in which is the statement of Grant that "If you are guilty and your brother is innocent, now is the time to tell it; I want to know;" * * * appealed to the better side of his nature; "told him that things looked pretty black for him, that we had talked this thing over and the developments showed me that he knew more about the crime than he was telling, and I asked him for the truth;" told him "the investigation so far looks pretty black for you; tell me the truth;" * * * told him a lot of things, but never offered any inducement, because witness has had too much experience in that line.

> Q. And this was what you meant by saying that you appealed to the better side of his nature—by telling him that the investigation looked awfully black and that he had better tell you the truth?

A. Yes; I thought if he told the truth about it, it would be the proper thing for him to do under the circumstances.

By an inspection of the passage from the opinion in the Bram case quoted and relied on by defendant it appears that he contends that Grant's statement held out a hope to him of some benefit to be derived by making a statement, that is to say that he was offered an opportunity of shifting to another direction the suspicious circumstances that pointed directly to him, and it is claimed that he availed himself of this opportunity by shifting the blame to Wu and Chen.

We submit, however, that Grant's statement did not hold out any such hope. Wan was told all of the facts that the detectives had learned about the case, and the facts thus told him could not have been calculated by any stretch of the imagination to lead him to believe but one thing, namely, that his guilt could no longer be concealed. The hope alleged to have been held out is not the kind of hope that is considered by the law. The hope considered by the law is something held out by one in authority to an accused as a favor, a benefit, or a payment, so to speak, for an acknowledgment of guilt. All that was done by Grant was to state the known facts to Wan. If as a result of this Wan embraced what he conceived to be an opportunity of diverting suspicion from himself to another and thereby made a statement from which with other facts guilt might be deduced, such statement was nevertheless voluntary.

While it is true that he might not have made the statement had not Grant told him those things, it was his free voluntary act.

Nor do we find any analogy in the *Bram* case to the facts surrounding the statement of defendant that he saw others commit the crime. In the case at bar the defendant was told that "The investigation so far looks pretty black for you," which was merely an expression by Grant of his opinion, whereas in the Bram case the accused was told that Brown had made a statement that he saw the accused commit the murder, which statement of necessity called for an expression in the nature of an explanation. Wan was not placed in any such situation for the reason that he had to make no reply to Grant's expression of opinion. His silence would not have been evidence against him had he not made a response.

The next contention concerning defendant's proposition is that Grant induced a statement by telling him that he had better tell the truth. We deny that the record shows that Grant made any such statement. What Grant did say to him was to tell the truth. What the record shows is that Grant was asked if this was what he meant by saying that he appealed to the better side of his nature by telling him that the investigation looked black and that he had better tell the truth. And Grant's answer was that he thought that if he told the truth about it it would be the proper thing for him under the cir-

cumstances. Here, again, we have an illustration of taking from its context and its background an expression and construing from it a meaning that it does not have when taken with the rest of the language to which it belongs. But even if Grant had told him it would be better to tell the truth, this fact alone would not render the statement thereafter made inadmissible.

It is true that in some of the early English cases it seems that such an admonition would render a confession involuntary. It seems to have been supposed at one time that saying "Tell the truth" meant in effect "Tell a lie." *Queen* v. *Reeves*, L. R. C. C. 362.

In *Reg.* v. *Garner*, 3 Cox, C. C. 175, Earle, J., said:

> I believe several judges have held, and it is certainly my opinion, that an exhortation to tell the truth can not be considered as an inducement to confess untruly, but it is for the judges at the trial to decide upon all the circumstances whether the words were used so as to operate upon the mind of the prisoner as an inducement to confess untruly.

In the *Murphy case*, *supra*, the Circuit Court of Appeals for the 7th Circuit in discussing the effect of an admonition that it was better to tell the truth stated, "The expression 'better tell the truth' and 'better be frank' and 'it will be best for you to tell the truth' have been before the courts on many occasions, and the majority have held them not sufficient to defeat the admission of the confession."

Aaron v. *State*, 37 Ala. 106.
Huffman v. *State*, 130 Ala. 89.
King v. *State*, 40 Ala. 314.
Steele v. *State*, 83 Ala. 20.
State v. *Kornstett*, 62 Kans. 221.
Heldt v. *State*, 20 Nebr. 462.
People v. *Kennedy*, 159 N. Y. 346.
Fauts v. *State*, 8 Ohio State 98.
Rozczyniala v. *State*, 125 Wis. 414.
Queen v. *Reeves*, L. R. C. C. 362.
State v. *Staley*, 14 Minn. 105.
State v. *Anderson*, 96 Mo. 241.
Heintz v. *Wisconsin*, 125 Wis. 405.

THE MAN WHO WENT TO THE BANK WAS THE MURDERER.

The purpose and function of all law is to serve and not subvert the ends of society. One of these ends is to denounce and punish those persons who wrongfully take the life of one of its members. For the purpose of establishing a basis upon which law may operate, we have rules of evidence designed solely for the ascertainment of truth. Although designed and calculated, so far as human experience can judge, to effect this purpose, it can not be said that these rules are all sufficient to exclude falsehood and educe only truth. This deficiency, arising as it does out of the diversity and inequality of the human intellect and judgment, is amply supplied, however, by the unanimous concurrence of the 12 minds of a jury.

Viewed in the light of these fundamental concepts, defendant's brief presents some very peculiar, if not startling, propositions. Stripped of all their outward

limbs and flourishes, and stated simply and directly, the position assumed and propositions asserted by him may be briefly summarized as follows:

When the facts and circumstances surrounding the commission of a crime points the finger of suspicion to a person, that person may not be placed under surveillance nor in custody for the purpose of ascertaining what he knows about the crime. If placed under surveillance or in custody, he must neither be told the facts and circumstances in the case nor be asked what he knows about it. If he is placed under surveillance or taken into custody, he is not, says the defendant, a free agent. Therefore whatever he may say about his connection with the crime is inadmissible against him.

Or, stated in another way, that because he is suspected of crime, the law, says the defendant, surrounds him with protection that is denied to any other member of society. If he is told of the facts and circumstances which placed him under suspicion, or is told that he is under suspicion, it is then claimed that because of the accusatory nature of the question, or the information conveyed to him, that anything he might state is involuntary.

The most startling part of defendant's position is that he claims that these propositions have been moulded into judicial precedent by the decision in the Bram case, and that brings us to the point where we desire to briefly present to this Honorable Court our analysis of the *ratio decidendi* in that case.

From a reading of that rather voluminous opinion, it is clear that the decision was rested upon but two grounds: (1) That Bram was put in fear, and therefore deprived of the freedom of mind as a result of being brought to the detectives' office and denuded of his clothing, and (2) that he was told that one Brown had seen him do the murder, thereby placing Bram in the situation where, if he remained silent, his silence might be used as evidence against him, tending to establish by conduct an admission of the crime. He was thereby compelled to speak out about his connection with the crime. The introduction in evidence of the statement thus made by him amounted to forcing him to give testimony against himself in violation of the Fifth Amendment of the Constitution.

As has already been adverted to in this brief, defendant seized upon the first reason for the ruling and maintains that because Bram was in custody he was not a free agent, and that it follows as a matter of established judicial precedent that the defendant, being in custody or what amounted to custody, was not a free agent. He also seizes upon the second reason of the decision, and says that the mere fact that Bram was accused or asked an accusatory question, his subsequent statement was involuntary, therefore, the defentant's statements, being made in response to Grant's accusatory questions are also involuntary. While his argument on this subject covers many pages of printed matter, the foregoing really states his contentions before this court.

Before closing our brief on this phase of the case, we desire, at the expense possibly of being tedeous, to briefly review the facts and circumstances surrounding these statements made by the defendant, the admission into evidence of which is claimed deprived him of the benefit of the law of the land.

It will be recalled that his first statement was to the effect that if the officers found the man who went to the bank they would find the murderer. This statement was not made in answer to an accusatory question; rather to a question that sought to convey to Wan's mind that he was not guilty, nor can it be said that Wan could have believed that had he remained silent on this point his silence would be evidence pointing to his guilt.

It is true that he was in a sense physically detained in custody—not permitted to go at will. But that is not the kind of lack of freedom that was mentioned in the Bram case. There Bram was not mentally free, because of the threat and menance that had been presented to him as a result of his situation. But no such inference can be drawn in favor of this defendant. He had voluntarily come to Washington, he said, to assist the officers; he had voluntarily acquiesced in going to the hotel; he had never complained of the presence of officers there with him; he had been offered no threat of any kind of harm, but according to Major Pullman had been in a good humor all the time about the matter. Mentally, therefore, he was what the law calls a free agent when

he told Grant that if he would find the man who went to the bank he would have the murderer.

DEFENDANT WROTE ENTRY ON CHECK STUB.

Several times during the week that he had been under detention at the Dewey Hotel, the defendant had expressed a desire to go to the Mission House to see how everything was there. He had been unable to go earlier in the week for the reason that he had broken his glasses, but on Saturday night, February 7th, he was taken to the Mission House, denominated in defendant's brief as "the house of the dead." The testimony clearly shows that there was nothing in this action to deprive defendant of his freedom of intellect and thought, but, on the contrary, it was rather in the nature of a gratification of a desire that he had theretofore expressed. Having said that he wanted to go there to see the condition of the house, the most natural thing in the world was for the officers to show him about the house and at the same time to explain to him what they knew about the murders. There was nothing in this to deprive the defendant of his freedom to remain silent or speak out. The record shows that the defendant remained silent most of the time, only stating occasionally, "That is too bad. I am sorry."

The record also shows that during this time he was not questioned. He was merely told that the officers knew about the situation. After he had been shown over the house and told all the details of where the bodies were found, shown the bullet holes, and the

condition of the house generally—which must have occupied some considerable time—he was taken upstairs, and there was exhibited to him photostat copies of several specimens of his own handwriting, and either the original stub or a photostat copy thereof of a bank book of the Chinese Educational Mission, on stub 24 of which there was indorsed, "T. T. Wong, $5,000." These same exhibits were later produced in evidence, and they were all, including said stub 24, unquestionably in the defendant's handwriting. Defendant does not maintain that being confronted with these handwriting exhibits deprived him of his freedom of action, or held out to him any threat, so it is not necessary to discuss the evidence to show that this was the fact. After being presented with these exhibits, the defendant went over them carefully. The similar characteristics and the similar writings were pointed out to him, and after he had made what appeared to be a careful inspection, he first said that he thought he wrote the indorsement on the check stub. He was told the officers wanted to know who did write that; they did not want to know what he thought, but they wanted to know whether or not he did write it. Thereupon Wan said that he did write it.

So far there has been no coercion, no threat, no harsh means, and no depriving the defendant of his free will in the matter. Defendant's position, however, is as stated in his brief at great length, that he was kept in this house where the three men were

killed and continually questioned throughout the whole of that night. Admitting to the full extent, defendant's inference from the record, it still does not prove that his statement concerning the writing of the check stub was involuntary, because whatever mental anguish he might have suffered as a result of continuous questioning from the time he made that statement until the next morning, there was little questioning done before he made the statement.

Our position is, that even if he had been threatened and menaced after he made the statement about the check stub, his condition of mind at the time of such threats and menaces could not be considered in passing upon the state of his mind at the time he made the admission and before such threats and menaces, if any such had been made. It is therefore clear that defendant was a free agent when he stated that he wrote the stub, and his statement to that effect was not influenced by either hope or fear, and therefore voluntary.

STATEMENT THAT DEFENDANT SAW WU KILL WONG AND HSIE, AND CHEN KILL WU.

On Sunday evening, February 9th, the record shows, according to the testimony of Burlingame, that Inspector Grant, Burlingame, Kelly, and one K. S. Wang, at about 7 o'clock in the evening, were at the police station where Wan was confined, and that Wan expressed the desire to talk to K. S. Wang by himself. He was allowed to do so. After a short time the police officers were called back and

were told by the defendant that he had witnessed the killing of the three deceased persons attached to the Chinese Educational Mission, and that Wu had killed Dr. Wong and Mr. Hsie, and then one Chen had killed Wu. He was then asked about the details of the killing which he said he had witnessed, but he said that he was tired, wanted to go to sleep and would talk no more that night, that if they would see him the next day he would tell more about it. Thereupon the officers left him to himself. (Rec. p. 68.)

We submit that this action on the part of the officers demonstrates that the defendant was not persistently questioned, harassed by accusations, or pushed into a corner, as claimed in defendant's brief, but that he was treated considerately, as the testimony of all the officers verifies.

STATEMENT THAT WU KILLED HSIE AND WONG, AND THAT WAN KILLED WU.

On the following day, Monday, February 10th, Grant and Burlingame interviewed the defendant at the police station where he was then confined, for the purpose of hearing the details of the killing that Wan had told them he would give. The defendant then stated that he desired to be taken to the Mission House; that he could explain better on the spot. When taken to the Mission House he started in to give the details of how he had seen the three men killed. During his statement Inspector Grant stated to him in effect, that he was putting Chen in it and

that he knew there was no Chen in it. Thereupon the defendant made the first statement in which he acknowledged his participation in the case, stating that he had killed Wu after Wu had shot Dr. Wong and Mr. Hsie.

In connection with this statement we submit that the record shows that the defendant was not coerced or menaced into making a statement, nor was he offered any hope, or given any promise, either in manner or expression, of benefit by those to whom it was made. On the contrary, it clearly appears that after a night in which to reflect upon the matter, he made his statement freely and voluntarily, at the scene of the murder to which he was taken at his own request.

DETAILED STATEMENT STENOGRAPHICALLY REPORTED, TRANSCRIBED, AND SIGNED BY WAN.

As has heretofore been stated, on Saturday, February 11th, Wan was asked by Burlingame if he would make a detailed statement to be taken down in writing and signed by him. At the same time Burlingame "advised him it was not necessary. Any statement he made would have to be voluntary and would be used against him, and he expressed a willingness to make it." Burlingame asked him to tell the story in his own way, and the defendant said, "No, you ask questions, I answer it better." (Rec. p. 7.)

In this form, the defendant made the statement which appears at pages 108 to 120 of the record. This lengthy statement was transcribed, and on the day after it had been made it was taken and read over to

him at his request at the jail. He said that it was his story, whereupon he signed it. (Rec. p. 7.)

Defendant's brief at some length endeavors to demonstrate that the statement on its face shows that it was not the defendant's confession, but amounted to no more than words put into his mouth by Detective Burlingame. We submit this position is not maintained. There are many instances throughout the statement in which the defendant refused to accept Burlingame's lead, but stated that it was not done that way, but in another way.

IT APPEARING UPON THE EVIDENCE THAT THE ADMISSIONS AND CONFESSIONS WERE VOLUNTARY, IT WAS PROPER TO SUBMIT THEM TO THE JURY FOR ITS CONSIDERATION.

Without so stating, defendant's brief takes the position that confessions are presumptively inadmissible, and that the Government in this case was under the burden of establishing its voluntary character before it could be admitted. There are to be found some decisions to this effect, but we submit this is not the rule in Federal courts. In the latter courts there is no such presumption against a confession. The rule is, however, that if it appears from the evidence that a confession was in fact involuntary, it is inadmissible as evidence against the accused. *Murphy* v. *United States*, 285 Fed. 801–807.

The evidence, the full integrity of which can never be reflected in the bill of exceptions, touching the facts and circumstances surrounding the making by the defendant of the several statements, was heard by

the trial court as it fell from the lips of the witnesses. It was his duty in the first instance to determine whether or not this evidence established in any degree that the confession was involuntary. The Court found and ruled that the statements were not involuntary, and that therefore should be admitted into evidence to be considered and determined by the jury.

The jury were fully instructed that if they found the confession was not voluntarily made they should entirely disregard it. The trial court's charge upon this point is, in part, as follows:

> That brings us to the subject of the confession. The highest court in our land has declared that a confession—I am going to read the exact language—"if freely and voluntarily made, is evidence of the most satisfactory character." That is the decision of the Supreme Court of the United States.
>
> You will notice the language "if freely and voluntarily made." That means, of course, the word "voluntary" is rather obscured to my mind by definition than elucidation. We all know what "voluntary" is—the free act of the will to do this or that thing, and not a will driven or compelled by another. I say again I hardly think that explanation or exposition can add anything to the word "voluntary." We know whether we act voluntarily or whether we do not; and so, in the law of confessions, which, as I say, are regarded most highly, if they are freely and

voluntarily made, we have to inquire in every case whether a confession is free and voluntary.

* * * * *

"The jury is instructed that the burden of proof is upon the Government to prove, beyond a reasonable doubt, that the oral confessions and admissions testified to by its witnesses and the written confession read to the jury were of a voluntary character, and that said confessions and admissions were made by the defendant freely, voluntarily, and without compulsion or inducement of any sort.

"The jury are instructed that in determining whether or not said confessions or admissions were voluntary, the jury may take into consideration the facts, if they find them to be facts, that the defendant, when he made the said confession or admissions, was in the custody of the police; that the police repeatedly questioned him and importuned him to talk about the case; that he was ill; that he was under guard, and not permitted to communicate with his brother or other persons than the police and doctor; and that the defendant was not warned that the confessions would or might be used against him or that he was not obliged to make any incriminating statement."

Now, that instruction, while containing again what we might call an abstract statement of law, might be very misleading, and in order that you might have what I consider to be law upon the subject, I will, in my own language, give you what I take to be the law relating to confessions. It is not only the

right, but it is the duty of the officers of the law to examine and question those whom they (fol. 160) have reason to suspect are guilty of a crime. If that were not the rule, their duties to the community would not be performed. Nor does that fact that they are officers, and in uniform, if need be, make any difference about their right to examine or question defendants. Nor does the fact that they do not warn the defendant that he need not talk, and that what he says may be used against him. That fact in itself does not invalidate a confession. That might not apply in this case, for the reason that, apparently, from the written confession here, this defendant was warned that what he said might be used against him. But no one of those facts, standing alone, invalidates a confession or prevents its admissibility.

The test of the case, and the inquiry that you will have to make in answer is: Did the questioning, did the physical condition, did the importunate questioning, if you choose to call it so, render the confession made by this defendant not his own; but did it substitute for his will the will of another, and thus was it or not his voluntary act? It is impossible to define the limit to which an officer may or should go in detecting or attempting to detect crime. On the one side he has his duty to the public, to us, always. On the other hand, he must not infringe upon the rights of the citizen, no matter who he may be. He must leave the confession in such a way that you can satisfy yourselves that it is the

ultimate expression of the will of the defendant, the voluntary statement of what he knows about his connection with the case. I am repeating, now, what I have said, but this is asked by the defendant:

"The jury are instructed to wholly disregard the alleged confessions, unless you believe from the evidence that the same, if any, were freely and voluntarily made. If you believe from the evidence that the confessions, if any, were made on coercion, whether mental or physical, on the part of the officer or officers involved, you will wholly disregard such alleged confessions, if any. The only way in which you can consider the confessions, if any, in evidence is for you to believe from the evidence that the same were freely and voluntarily made."

As I say, that must be taken in connection with what I have defined to you to be the right and duty of the officers in attempting to find out those who are responsible for criminal acts.

"No confession is deemed to be voluntary if it appears to have been caused by any inducement, threat, promise, or coercion proceeding from a person or persons in authority, and if such inducement, threat, promise, or coercion gave the defendant reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him. The police having a prisoner in custody are persons in authority. Any threat or coercion, whether

mental or physical, or any hope engendered or encouraged that he will be more favorably dealt with if he will confess is enough to exclude the confession thereby superinduced, and any words spoken in the hearing of the prisoner, or any coercion, whether mental or physical, which may engender such fear or hope will render it necessary that a confession made within a reasonable time after it shall be excluded, unless it is shown by clear and full proof that the confession is voluntarily made after all hope or fear of coercion, whether mental or physical, has been fully withdrawn or explained away."

Now, in this case, as you will all recall from the evidence, this (fol. 161) defendant was questioned for a period of practically a week in what appeared to be comfortable quarters in a hotel in this city. He was excluded from having his brother visit him, which, to my mind, was not an act of coercion on the part of the police. There is a certain amount of discretion that must be used by those who are employed to enforce the law, and it seems to me that was not unreasonable. That he was ill is undoubtedly true; that he had food is undoubtedly true, if he wanted it; and, as I say, the view that is presented to you is a view to be taken as a whole: Was this man's confession of his own free will or was he coerced by intimidation, threats, or promise? Now, it appears that Burlingame had a conversation with him, I think at the station, which led up to this subject of the

signed confession. If I am mistaken about that, correct me. I think it was the station house.

Mr. O'SHEA. It was at the mission house that Burlingame made the notes, before going to number ten station.

The COURT. Where was it Mr. Burlingame took the notes?

Mr. LASKEY. At number ten.

Mr. O'SHEA. At the mission house on Monday morning.

The COURT. He took the notes at the mission house, and afterwards he met the defendant, in company with a stenographer, and the defendant asked Mr. Burlingame to ask him the questions and he would answer them. These questions were taken down in shorthand, and transcribed, presented to the defendant, and he signed the entire confession and initialed each page of it.

Now, of course, that was the most important statement, if it was admissible at all in evidence, that he made, and it is for you to determine on this subject of the admissibility of the confession whether, taking all the treatment which he had received prior to that time, he was in such condition when he signed that statement and initialed those pages that he was acting of his own free will and accord.

While most of the testimony on the issue thus presented to them could only be determined by consideration of the credibility of the various witnesses giving the testimony, there was one piece of testimony, namely, the handwriting exhibits, which speak

for themselves. With these exhibits before them they could reach but one conclusion, and that was that the defendant spoke truly when he said that the entry on the check stub was in his own handwriting.

It is true that individuals will differ as to the inference and ultimate conclusions to be drawn from testimony, but we submit that little difference can arise in reaching the proper deductions and conclusions from the testimony in this case. The record in this case almost demonstrates, aside from defendant's confession, that he participated in the murder of these three members of the Chinese Educational Mission, and that when first questioned about his knowledge or connection with the affair it was his intention to engage in a skill of wits to divert the officers and cast suspicion from himself by showing his readiness to assist in finding the murderers out. That as the investigation proceeded, and bits of information were gleaned by the officers, such as the fact that defendant's brother, Van, had gone to Riggs National Bank and presented a $5,000 check drawn upon the deposit of the Chinese Educational Mission, and that Wan had left the Mission House and stayed at the Harris Hotel at a time when he stated he was in New York, he came to the final conclusion, as most persons burdened with a guilty conscience would do, that he would confess his crime and therefore be relieved of the burden of the mental strain occasioned by secrecy.

CONVERSATION BETWEEN K. S. WANG AND DEFENDANT NOT ADMISSIBLE.

While Wan was on the stand he started to state something that K. S. Wang had told him. The District Attorney objected, whereupon the following occurred:

Mr. O'SHEA. If the court please, we believe it is part of the circumstances surrounding the making of the confession, and we believe that *if* K. S. Wang made certain inducements *or* suggestions to this man, as the result of which this man made a statement, that that is proper.

The COURT. There is nothing to show that K. S. Wang had any authority to make any representations or take any part in the case.

Mr. O'SHEA. That may be true; but *if it should appear* that he was used by the police for that purpose——

The COURT. It does not appear yet.

Mr. O'SHEA. Detective Grant said, if I recollect the testimony correctly, that he did get K. S. Wang to talk to this boy.

The COURT. He said Wang talked to this defendant, but that he got him to act for the police—there is no such testimony as that.

Mr. O'SHEA. I think he sent him in.

The COURT. It may be he went so far as to say he sent him in; I do not recall the exact language, the exact testimony, but there is nothing from which you can reason he had any authority to represent the Government in this case.

> Mr. O'SHEA. Very well; we make the offer to go into this conversation, and with the court's refusal to permit us to do so we take an exception. (Rec. p. 144.)

It should be noted that the offer was to go into a conversation that was clearly hearsay, without any showing or assurance to the court of its admissibility. The record does not show what the witness would have said had he been permitted to continue. We therefore submit that it was not the duty of the trial court to admit hearsay testimony on the chance that it might be admissible under some exception to the rule. Suppose Grant had authorized Wang to offer Wan an inducement to confess, there was nothing in counsel's offer to go into the conversation to show the court that Wang actually held out to Wan any inducement. On the other hand, we submit that if any inducement had actually been held out by Wang, counsel's method of trying the case is evidence that he would have brought it to the attention of the court. On its face counsel's statement shows that he had nothing to offer, but merely desired to take an exception to be argued on appeal. In the absence of any showing to the court that the testimony would have been admissible it was the trial court's duty to refuse to permit the witness to proceed and state what Wan had told him.

Ferry vs. *Henderson*, 32 App. D. C. 41, 47.
Fitzpatrick vs. *Capitol Traction Co.*, 46 App. D. C. 13.

THE JUSTICE WHO PRESIDED AT THE TRIAL HAVING DIED IT WAS COMPETENT FOR ANOTHER JUSTICE TO SETTLE THE BILL OF EXCEPTIONS.

Section 953 of the Revised Statutes as amended by the Act of Congress of June 5, 1900, 31 Stats. 270, is applicable to the District of Columbia. No inconsistency exists between it and Section 73 of the District Code. This latter Section does not undertake to say who shall, or who shall not, settle a Bill of Exceptions. It merely provides that the Bill of Exceptions shall be settled "in such manner as provided in the rules of the Court," and the only limitation the Statute places upon the power of the Court in respect of such rules is that the Court can not require the Bill of Exceptions to be sealed. Therefore the two Statutes may be followed in the District of Columbia without the one interfering with the other. *Roney* v. *United States*, 43 App. D. C. 553.

It is, however, contended by counsel for Wan that this Court held in the case of *Hume* vs. *Bowie*, 148 U. S. 245, that Section 803 of the Revised Statutes of the District of Columbia which is substantially the same as Section 73 of the District Code, required as matter of course the granting of a new trial where the trial justice died before the Bill of Exceptions was settled. But the Court was there not concerned with Section 803, R. S. D. C., but with the then existing rule of the Court made pursuant to said Section. This rule, which was Rule 64, read as follows:

> 64. In case the *Judge* is unable to settle the Bill of Exceptions and counsel can not settle it by agreement, a new trial shall be granted.

It will be noted that this rule refers only to "the judge," which this Court held to refer to the trial justice. But in 1909 the rule was changed to read as follows (Rule 48, Par. 3):

> If the *Court* is unable to settle the Bill of Exceptions, a new trial shall be granted.

By the word "Court" any justice of the Court, must have been intended. If only trial justice was meant, why the change in the rules? A change of language indicates a change of purpose. It is apparent that the word "Court" was inserted in lieu of the word "judge," to meet a situation such as this. The best evidence of what this rule means is the fact that the court which made the rule by signing the Bill of Exceptions in this case interpreted it to mean that another justice than the trial justice could settle a Bill of Exceptions.

THE CONTENTION OF DEFENDANT THAT THE COURT OF APPEALS ERRED IN HOLDING THAT HE WAS PRESUMABLY INDEBTED TO WU AT THE TIME OF THE LATTER'S DEATH.

In delivering its opinion in this case the Court of Appeals, in passing on an error that had been assigned to the admission of certain testimony showing motive for the murder of Wu, made the following statement:

> On the question of motive evidence of the financial condition of defendant at and prior to the time of the homicide was admitted over the objection and exception of defendant. These transactions had direct relation to the Mission. Two checks he had received from

Wu—one on the 27th, the day he left the Mission. He was presumably indebted to Wu at the time of the homicide.

Defendant's brief on page 147 takes issue with the Court of Appeals and states that the Court of Appeals was in error. It is claimed by defendant that no such presumption arose. In this connection we desire to direct the court's attention to page 137 of the record, in which the defendant himself testified that he had borrowed this money from Wu for the purpose of loaning it to one S. C. Hung. In view of this statement in the record, the presumption indulged in by the Court of Appeals could not have been error.

EXAMINATION OF DEFENDANT BY TRIAL COURT.

The record, pages 151 to 155, discloses that while he was being cross-examined the Court, of its own motion, intervened and asked Wan a number of questions. Up to this point Wan had been rather hazy about his reason for making the oral and written confessions. He had denied making the statement to Grant that the man who went to the bank was the murderer, and he also had denied stating that he wrote the check stub. He had not in his direct or cross-examination given any explanation as to what, if anything, induced him to make first the oral and then the written statement acknowledging his felonious killing of Wu. In this situation it was of the highest importance that Wan be given an

opportunity to explain fully the means used, if any, to force him, as he claimed, to confess against his will. That the Court's questions were searching can not be denied, but we submit that the situation called for searching questions. It was the court's duty to see, whether the confession should go to the jury.

It was equally the court's duty to see that when the question of its voluntariness was finally submitted to the jury it should have all the light on the subject possible. A horrible crime had been committed. The defendant, who had in writing confessed the commission of the crime, was on trial. The duty of the court to the public was no less than to the accused. It was therefore no time or place to bandy words or deal in fine discriminations. It is obvious that the trial justice by his examination of Wan had in view two objects, first, to give the defendant an ample opportunity to state unequivocally and fully what, if anything, induced him to confess to the crime for which he was on trial, and, second, to satisfy himself that the confessions should be submitted to the jury. This situation was recognized and appreciated by defendant's counsel, for we find that he not only did not make any objection, but stated that he wanted the whole of the examination to go to the jury without exception. At page 155 of the record we find the following:

> Mr. O'SHEA. We felt, in view of that fact, that the questions and answers ought to be permitted to stand in the record.

The COURT. I am perfectly willing. Might I also add, Mr. O'Shea, that there was no objection made at all to the court's questions?

Mr. O'SHEA. Of course there was not, until your honor of his own motion——

The COURT. (Interposing.) Of my own volition.

Mr. O'SHEA. (Continuing.) Struck out the question and answer which we thought was vitally important to go to the jury.

The COURT. All right. It goes.

Mr. LASKEY. You want it to go to the jury?

Mr. O'SHEA. I certainly do. I want all the questions and answers of the court to go to this jury intact, the way they were asked and answered.

The COURT. Without exception.

Mr. O'SHEA. Yes.

The COURT. That is satisfactory.

After referring to the language hereinabove quoted, the Court of Appeals in rendering its decision said:

> It is difficult to understand the position now assumed by counsel for defendant, after insisting that the testimony should go to the jury without objection or exception. This amounts to a complete waiver of any right to claim error on appeal. Counsel will not be permitted to thus inveigle the court into complying with a specific request for the purpose of using it as a basis for error on appeal. (Rec. p. 186.)

To the same effect was the opinion of this Honorable Court in the case of *Alexander* v. *United States*, 138 U. S. 353, 355, which was a capital case in which

the judgment inflicted the death penalty. There the court refused to consider an alleged error that had not been reserved by an exception, and in delivering its opinion used the following language:

> But the decisive answer to this assignment is that the attention of the court does not seem to have been called to it until after conviction, when the defendant made it a ground of his motion for a new trial. It is the duty of counsel seasonably to call the attention of the court to any error in empaneling a jury, in admitting testimony, or in any other proceeding during the trial by which his rights are prejudiced, and in case of an adverse ruling to note an exception.

See also *Sparf* v. *United States*, 156 U. S. 51, 56.

Holder v. *United States*, 150 U. S. 91.

Tucker v. *United States*, 151 U. S. 164.

Hickory v. *United States*, 151 U. S. 303, 307.

Nor is this rule a technical one operating only to a defendant's prejudice. The people, represented by the Government, have a vital interest in the trial of persons charged with the commission of crime, and for this reason a defendant should not be permitted to refrain from asserting some right which has been accorded him for his protection, and then later (in this case more than five years later) complain that he was thereby injured.

It is not an uncommon thing for a defendant in the trial of a case to refrain from interposing an objection to some line of examination or the method of con-

ducting the same, and prefer to have the matter remain in the record for the purpose of taking advantage of it in his argument to the jury. May a defendant obtain this advantage, and having obtained and used it, have also a reversal of the judgment against him?

Wilson v. *United States*, 162 U. S. 613, 614.

That the defendant thought he would gain an advantage by the responses elicited by the court's examination is apparent from his counsel's statement to the court, "I want all the questions and answers of the court to go to this jury intact, the way they were asked and answered." But if the point had been properly reserved by an exception there was no prejudice in the questions. It is only the responses made to the questions that injured defendant. Of such injury he can not complain.

CHARGE TO THE JURY.

Notwithstanding that no exceptions were taken, we find that appellant has brought before this court for review the court's charge to the jury. One part of the charge complained of is as follows:

> In this case, both by the nature of the testimony and by the argument of counsel, it has resolved itself into two parts—I won't say distinct, because they are dependent, interdependent. The first is, Is the defendant proven to be guilty by the circumstances which have been introduced by the Government? and the second is, Is his confession to be taken against him under the rules of law which I will state to you, which, of course,

without contradiction, I suppose, on the part of counsel, if it is admitted, will show that he was guilty of this crime? (Rec. p. 171.)

The contention is here made that this instruction amounted to telling the jury that if they received and considered the confession then they should find the defendant guilty. We submit, however, that no such inference can be drawn from the language of the court. It is perfectly clear that what the court meant was that if the confession was admitted to be true then the defendant was guilty of the crime. And we submit that this amounted to nothing more than an application of the law to a supposed state of facts—that is to say, if the confession was admitted to be true, that it contained proof of every essential element necessary to make out the crime charged in the indictment. Furthermore the court by stating "without contradiction, I suppose, on the part of counsel" really invited an objection should counsel not agree with the court. That if the confession were true it was proof of all the essential elements of the crime charged, the defendant can not successfully deny. His failure to accept the court's invitation to make an objection and reserve an exception shows that he did not then deem the court's statement of the law open to an attack.

Another vice of the defendant's argument is that he singles out an expression used by the court without considering the other parts of the charge which necessarily must be considered to arrive at the court's meaning. In other words, the jury had the whole

of the court's charge before it, and we submit that when so considered defendant's proposition can not be maintained.

Respectfully submitted that the judgment of the Court of Appeals of the District of Columbia should be affirmed.

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